

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of:

Petition of Bell Atlantic Corporation for Relief)
from Barriers to Deployment of Advanced)
Telecommunications Services)

CC Dkt. No. 98-11

To: The Commission

COMMENTS

Network Access Solutions, Inc. ("NAS") submits these comments in opposition to two narrow but important aspects of the broad relief that Bell Atlantic requests in its petition.

BACKGROUND

NAS is preparing to offer a telecommunications service in Bell Atlantic's exchange service area using xDSL technology. The service will provide an end user with high-speed access to the Internet by giving the user a high speed, dedicated transmission path that connects the user's premise with a nearby point of presence of the end user's Internet access service provider ("ISP"). The service will permit NAS customers to use the Internet at a speed which is many times greater than the maximum 56 kB/second speed that is possible through a regular dial-up telephone connection.

NAS will provide service by using voice-grade local loops and transport obtained from Bell Atlantic as unbundled network elements.^{1/} NAS will deploy xDSL technology on both

^{1/} NAS also will obtain collocation service from Bell Atlantic. A "voice-grade local loop" is a two-wire or four-wire loop typically used for exchange telephone service. While NAS will use voice-grade local loops in providing a service that gives end users high-speed access to the Internet, some voice grade loops cannot effectively sustain xDSL transmissions due to their length or other technological reasons.

ends of each voice-grade loop in order to permit high-speed transmissions over these loops. The company has spent several months testing its service with Bell Atlantic in Northern Virginia.^{2/}

NAS can provide high-speed connections to the Internet economically because of Sections 251 and 252 of the Communications Act. Those provisions require Bell Atlantic to enter a carrier-to-carrier contract setting forth the terms under which it will provide the other carrier with network elements on an unbundled basis and with certain other facilities and services. The contract becomes effective in a particular state after the public utility commission in that state finds, among other things, that the prices set forth in the contract for network elements and other facilities and services are based on cost. NAS and Bell Atlantic have entered into a contract of this type, and the public utility commissions in six states where Bell Atlantic provides exchange service have approved that contract.

NAS is not alone in using unbundled network elements to provide end users with a high speed connection to the Internet using xDSL technology. Although the number of people with high-speed Internet connections is presently small, several carriers within the last few months have begun using xDSL technology in combination with unbundled network elements to provide end users with such connections, and one market analyst recently projected that the xDSL chip

^{2/} The NAS offering constitutes interstate special access service. It is a *special access* offering because it provides NAS customers with a dedicated transmission path that connects locations specified by the customer within a local exchange area (*i.e.*, the customer's premises on one end and a local point of presence of the customer's ISP on the other end) so that the customer may send (receive) information to (from) Internet host computers located in other exchange areas. See MTS and WATS Market Structure, Memo Op. and Order, 54 Rad. Reg. (P&F) 2d 615, 629-30 (1983)(defining special access service). The NAS special access service is jurisdictionally an *interstate* offering since more than 10 percent of all transmissions to and from NAS customers will terminate in states other than the one where they originate given that Internet host computers are disbursed widely throughout the world. MTS and WATS Market Structure, Decision and Order, 4 FCC Rcd. 5660 (1989)(holding that a special access offering is jurisdictionally interstate if more than 10 percent of transmissions over the special access service originate and terminate in different states).

set market alone will grow in triple digits reaching 22 million units and nearly \$700 million in revenue in 2000.^{3/}

Among other things, Bell Atlantic asks the Commission in its petition to waive numerous regulations that it claims reduce its own incentive to provide end users with a high-speed connection to the Internet using xDSL technology. For example, it asks the Commission to let it provide customers with high-speed Internet connections free of the agency's price cap rules. It also requests waiver of the requirement in Section 251(c)(4) of the Act that it sell its high-speed Internet connection service to other carriers at a wholesale price for resale to third parties. And it asks the Commission for waiver of the requirement in Section 251(c)(3) that it make available unbundled network elements to other carriers for providing end users with high-speed connections to the Internet in competition with Bell Atlantic.

Regardless of what action the Commission may take on other requests for waiver that Bell Atlantic makes in its petition, the agency should *not* grant two of the waivers that the com-

^{3/} "In-Stat Expects the xDSL Chip Set Market to Explode by 2000", Business Wire (Feb. 6, 1998). Companies that are reported recently to have begun using voice grade loops to provide high speed xDSL Internet access include the following: Northpoint Communications offers xDSL access in the San Francisco and Silicon Valley areas (<http://www.northpoint.com/html/home.html>); Northwest Link offers xDSL access service in and near Seattle (<http://www.nwlink.com/nwlink/rateserv/rateserv.html>); Direct Network Access and Covad Communications have initiated xDSL access service in the San Francisco Bay area (<http://www.telechoice.com/xdsl/newz/showDSL.cgi?881333068> and <http://www.telechoice.com/xdsl/newz/showDSL.cgi?886000113>); Votts Network provides xDSL access service in New Hampshire (<http://www.dlcc.com/release13.htm>); Conectiv Communications has begun an xDSL access trial in Delaware (<http://www.telechoice.com/xdslnewz/showDSL.cgi?882197823>); and InterAccess provides xDSL access service in downtown Chicago ("ADSL Pioneer Looks to Expand Territory", Interactive Week (Aug. 18, 1997).

pany requests.^{4/} First, the Commission should not exempt Bell Atlantic from its duty to comply with the statute requiring it to provide other carriers with voice grade loops and other network elements so that they can provide end users with high-speed connections to the Internet. Second, the agency should not waive its price cap rules so that Bell Atlantic itself can provide customers with high-speed connections to the Internet free of price regulation. Each of these two matters is discussed below.

DISCUSSION

I. The Commission Should Not Exempt Bell Atlantic from Its Duty to Provide Carriers with Voice Grade Loops and Other Unbundled Network Elements for Provision of a Telecommunications Service that Provides End Users with a High Speed Connection to the Internet

Although the breadth of its request for waiver of the requirement to provide unbundled network elements is ambiguous, Bell Atlantic appears to request waiver of the requirement that it provide all such elements, including voice grade loops, to any carrier who intends to use those elements to provide end users with a high speed connection to the Internet.^{5/} This relief is justified, according to Bell Atlantic, in order to increase Bell Atlantic's own incentive to provide customers with a high-speed connection to the Internet.

For several reasons, the FCC should not waive Bell Atlantic's duty to provide voice grade loops and other network elements on an unbundled basis to carriers who use those ele-

^{4/} NAS does not oppose some of the relief that Bell Atlantic proposes. For example, NAS has no objection to the request for waiver of the provision in Section 271(c) of the Act that bars Bell Atlantic from providing high speed interLATA data service to customers within its exchange area until after the company opens its exchange market to competition.

^{5/} Pet. at 3, 17.

ments to provide a telecommunications service that gives end users a high-speed connection to the Internet. First, granting this waiver would be contrary to the public interest because it would frustrate the development of competition in the market for high speed Internet connections given that there is no way economically to provide high speed Internet connections using xDSL technology to the overwhelming majority of people located within Bell Atlantic's exchange service area without using Bell Atlantic network elements, such as voice grade loops. Even if a Bell Atlantic competitor were able economically to justify the substantial investment that would be required to deploy the transmission infrastructure necessary to serve very large corporations, it plainly could not justify making such investment to serve residences or small and medium sized businesses.^{6/}

Nor is there a basis for the FCC to conclude that the ability to provide end users with high-speed Internet connections using technologies *other than* xDSL will prevent public harm even if Bell Atlantic obtains a de facto monopoly in providing high speed Internet connections using *xDSL technology* since the market for high speed Internet connections has only recently begun to develop. For example, although some cable TV operators have begun to provide high-speed Internet access by using their cable transmission facilities, the cable TV technology they use is at least as nascent as xDSL technology. Other technologies for providing high speed Internet connections are even less developed.

^{6/} Waiving the requirement to provide voice grade loops to carriers who provide high speed Internet connections also could frustrate competition in the traditional telephone exchange market since CLECs then would be forced to recover loop costs entirely from voice telephony revenues while their incumbent LEC competitors could recover their own loop costs from a combination of voice telephony and high speed Internet connection service revenues. Indeed, some incumbent LECs already have announced plans to provide both voice telephony service and high speed Internet connection service over the same voice grade loop. See, e.g., BellSouth Notification of Trial of ADSL Service Offering (CC Dkt. No. 88-616, June 27, 1997); US West Pet. for Relief at 24-25 (CC Dkt. No. 98-26, Feb. 25, 1998).

Denying network elements to carriers desiring to use those elements in providing high-speed Internet connections also would be unlawful under Section 251(c)(3) of the Communications Act. That statute requires incumbent LECs to provide all carriers with network elements on an unbundled basis for the provision of *any* telecommunications service. A carrier who provides an end user with a high-speed connection to the end user's ISP plainly provides "telecommunications service".^{7/}

Nor could the Commission lawfully use its authority under Section 10 of the Act to exempt Bell Atlantic from the requirement to provide unbundled network elements to carriers desiring to provide high-speed connections to the Internet. That statute gives the FCC authority to exempt Bell Atlantic from the requirement to provide network elements on an unbundled basis only after Bell Atlantic complies with all requirements of Section 251(c). Bell Atlantic does not claim in its petition that it has met all of those statutory requirements.

Bell Atlantic's claim that Section 706(a) of the Act authorizes the Commission to waive the requirement that it provide unbundled network elements also is misplaced.^{8/} Section 706(a) permits the FCC to waive enforcement of a regulatory policy only if the Act does not mandate that policy. Section 706(a) gives the FCC no power to waive the network unbundling rules since Section 251(c)(3) of the Act, by its express terms, mandates those rules. Moreover, Section 706(a) permits a waiver only of policies applicable to "switched broadband telecommunications capability." The requirement to provide local loops and transport as unbundled network elements is a requirement to provide *transmission* capability, not "switched broadband telecommu-

^{7/} See note 2, *supra*.

^{8/} Pet. at 6-11.

nications capability.” Finally, Section 706(b) permits waiver only when it “promote[s] competition in the telecommunications market.” There is no basis for concluding that eliminating the requirement that Bell Atlantic provide network elements on an unbundled basis to carriers desiring to provide high speed Internet connections would promote competition in the market for such connections as explained above.^{9/}

Even if the FCC somehow could justify exempting Bell Atlantic from the requirement to provide some carriers with unbundled network elements for providing high speed Internet connections (which it cannot do as explained above), the agency should make clear that Bell Atlantic must comply with commitments in *existing* §251 contracts to provide such elements in order to avoid unfairly hurting carriers who have relied on these commitments.^{10/} For example, Bell Atlantic’s contract with NAS conditions NAS’s right to obtain a voice-grade loop for provision of a high speed Internet connection to a given end user on NAS first paying Bell Atlantic to determine whether the existing loops capable of serving that end user will technically support xDSL transmissions. If Bell Atlantic were to discontinue providing NAS with voice-grade loops

^{9/} US West and Amertech have filed petitions that request some of the same relief sought by Bell Atlantic here. But unlike Bell Atlantic, US West and Ameritech both make clear that they do not seek an exemption from the requirement to provide a carrier with voice grade loops merely because the purchasing carrier intends to use those loops to provide high speed connections to the Internet. See US West Pet. for Relief at 48 (CC Dkt. No. 98-26, Feb. 25, 1998); Ameritech Pet. at 18 (CC Dkt. No. 98-32, Mar. 5, 1998). Moreover, US West does not appear to seek an exemption from the requirement to provide as an unbundled network element a loop to which US West *itself* has attached an xDSL modem on both ends. See US West Pet., *supra*, at 5, 49 n.28 (stating its willingness to provide local loops as an unbundled network element which US West has “conditioned” for high-speed data transmission).

^{10/} In the absence of this clarification, Bell Atlantic might claim that grant of the requested relief permits it to escape its contractual duty to provide voice-grade loops to carriers desiring to provide high-speed Internet connections since a provision in Bell Atlantic’s standard §251 contract conditions the obligation to provide network elements on an unbundled basis on “the requirements of the FCC.” To the extent Bell Atlantic seeks to escape from its contractual obligation to provide NAS with network elements on an unbundled basis, the company has violated the provision in its agreement with NAS which states that “[n]either Party shall advocate before any legislative, regulatory, or other public forum that any term of the Agreement be modified or eliminated, unless mutually agreed to by the Parties.”

during the contract term, NAS might have no way to recover much of the up-front expense it has incurred under this provision since the marketplace requires that NAS recover this expense in its recurring monthly charges for providing service.

II. The Commission Also Should Decline to Deregulate the Price that Bell Atlantic Charges End Users Who Subscribe to Bell Atlantic's Own Service Providing High Speed Connections to the Internet

The FCC also should deny Bell Atlantic's request to exempt its high speed Internet connection services from price cap regulation since granting that request would unlawfully prejudice an FCC rulemaking.^{11/} While the Commission has called for comments in two pending rulemakings on various ways to relax its price regulation rules, it has not yet adopted any of those proposals.^{12/}

Exempting Bell Atlantic's high speed Internet connection services from price cap regulation not only would unlawfully prejudice the pending rulemakings, it also would be inconsistent with the proposals for relaxed regulation upon which the FCC has sought comment in those rulemakings. For example, the agency has asked whether it should give an incumbent LEC increased flexibility to price a specific service when the LEC demonstrates that there are no barriers that prohibit others from providing that particular service.^{13/} Exempting Bell Atlantic from the requirement to provide potential competitors in the high speed Internet connection market with network elements on an unbundled basis would constitute a significant (indeed almost insurmountable) barrier to competition in that market as explained above. Nor has Bell

^{11/} Pet. at 4, 17.

^{12/} See Price Cap Performance Review for Local Exchange Carriers, Second Further Notice of Proposed Rulemaking, (CC Dkt. No. 94-1), 11 FCC Rcd. 858 (1995); Access Charge Reform Notice of Proposed Rulemaking, 11 FCC Rcd. 21354 (1996).

^{13/} Second Further Notice, *supra*, 11 FCC Rcd. at 906-07; Access Charge Reform Notice, *supra*, 11 FCC Rcd. at 21440-41.

Atlantic shown an absence of significant barriers to competition in the high-speed Internet connection market even if it is not exempted from the requirement to provide competitors with network elements on an unbundled basis. The FCC's request for comments on whether to loosen price cap regulation of a substantially competitive service likewise provides no support for exempting Bell Atlantic's high speed Internet connection services from price cap regulation since the market for high speed Internet connection service is nascent rather than substantially competitive as explained above.^{14/}

CONCLUSION

While NAS does not oppose some of the relief that Bell Atlantic seeks, it would be both unlawful and contrary to the public interest for the Commission to waive enforcement of regulations (i) that obligate Bell Atlantic to provide network elements on an unbundled basis to carriers desiring to provide end users with high speed Internet connections and (ii) that subject Bell Atlantic's own high speed Internet connection service to the agency's price cap rules.

Respectfully submitted,

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^{14/} Access Charge Reform Notice, supra, 11 FCC Rcd. at 21422 (1996); Second Further Notice, supra, 11 FCC Rcd. at 918. While US West's recently filed petition (CC Dkt. No. 98-26, supra) requests some of the same relief that Bell Atlantic seeks, US West does *not* ask the Commission to eliminate price cap regulation of US West services providing high speed connections to the Internet.